STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 9, 2008
v PAUL RONALD COPAS, Defendant-Appellant.	No. 277240 Washtenaw Circuit Court LC No. 06-001195-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JOSHUA JOSEPH TACKETT, Defendant-Appellant.	No. 277549 Washtenaw Circuit Court LC No. 06-001194-FC

Before: Donofrio, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Following a joint trial before separate juries, defendants Paul Copas and Joseph Tackett were each convicted of two counts of first-degree premeditated murder, MCL 750.316(1)(a), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Each defendant was sentenced to life imprisonment without parole for the first-degree murder convictions, to be served consecutive to two concurrent two-year terms of imprisonment for the felony-firearm convictions. Defendants appeal as of right. We affirm.

I. Docket No. 277240 (Defendant Copas)

A. Ineffective Assistance of Counsel

Defendant Copas first argues that he was denied the effective assistance of counsel at trial. We disagree. Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective

assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness and that it is "reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). A defendant must also overcome the presumption that the challenged action or inaction was sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

1. Failure to Move to Suppress Defendant Copas's Statement

Defendant Copas argues that defense counsel was ineffective for failing to challenge the admissibility of two statements that he made to the police. He argues that the first statement, which was exculpatory, was improperly obtained without advising him of his *Miranda*[1] rights, and that the second statement, which occurred after he was advised of his *Miranda* rights, should have been suppressed as the fruit of the illegally obtained first statement, and further, because it was not voluntarily made. We disagree.

Only the second statement was admitted at trial. It is apparent from the substance of the statement that defense counsel's decision not to challenge its admissibility was a tactical one. Decisions about defense strategy, including what arguments to make and what evidence to present, are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendants Copas's convictions arise from his participation with codefendants Tackett, Tony Tard, and Sarah Sykes in a drive-by shooting of Clint Ousley's trailer during which two teenagers were killed. Two eyewitnesses testified that defendant Copas was in the rear of a van and fired an assault rifle while codefendant Sykes drove the van. The defense theory was that defendant Copas was the driver of the van rather than a shooter, had no idea that codefendants Tackett or Tard intended to harm anyone, and did not know that anyone was in Ousley's trailer. The primary support for this theory came from defendant Copas's police statement. It is apparent that one of defense counsel's strategies was to support the defense and counteract the testimony against defendant Copas with defendant Copas's account of the events as described in his police statement. As the trial court aptly noted when denying defendant Copas's motion for a new trial on this basis, the admission of defendant Copas's statement allowed the jury to hear his version of events without subjecting him to cross-examination. Trial counsel's decision to proceed in this manner was not objectively unreasonable or prejudicial. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.* at 76-77. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

[1] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

2. Failure to Elicit Evidence

Defendant Copas also argues that defense counsel was ineffective for failing to further question a sheriff's deputy and a ballistics expert to elicit additional support for the defense theory that the defendants only intended to cause property damage. Defendant Copas relies on an affidavit from codefendant Tard's attorney, which contains the following averments:

> 2. On July 16, 2007, Mr. Tard pled guilty to open murder. From July 16 until July 19, 2007, Judge Shelton held a degree of guilt hearing.
>
> 3. The case involved the death of two victims inside a mobile home after a drive-by shooting. During the hearing, Deputy Sheriff Lisa Farst testified to arriving at the mobile home a few minutes before the shooting in response to noise complaints. The shooting took place only a few minutes after Deputy Farst left the scene. During my cross-examination, Deputy Farst stated that she observed the trailer with a closed window blind, and no shadows moving inside. Clint Ousley, the owner of the trailer met her outside, and she could not tell if anybody was in the mobile home.
>
> 4. During the hearing, Officer Jeffrey Amley of the Michigan State Police forensic science lab in Northville testified to the location and trajectory of the bullet holes in the trailer. On cross-examination, he explained that most bullets traveled at an upward angle from their entrance on the east side of the trailer to their exit on the west side.
>
> 5. Based on both this specific evidence and other evidence from the hearing, Judge Shelton found that both Mr. Tard and co-defendant Sarah Sykes guilty of the lesser offense of second-degree murder, rather than first degree murder.

The questioning of witnesses is a matter of trial strategy. *Rockey*, *supra*. Ineffective assistance will be found only if the failure to present evidence deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod 453 Mich 902 (1996).

The record discloses that defense counsel questioned Deputy Farst about her observations at Ousley's trailer. Farst testified that she went to Ousley's trailer at approximately 11:00 p.m. because of a noise complaint. Farst described what she observed when she arrived, including that "[t]he lights were on inside the trailer," "[n]o one was outside or around" and, as she pulled up, Ousley "came out." She further testified that she saw nothing unusual at the trailer, saw no other individuals other than Ousley, and did not recall if there were any vehicles parked outside. In addition, the jury saw a video recording made from the deputy's patrol car showing the conditions at the trailer five minutes before the shooting. In addition, evidence that the blinds were closed at the time of the shooting was presented through the ballistics expert, and no one disputed that the blinds were closed. Although Farst did not testify using the precise words she allegedly used at the degree hearing for codefendants Tard and Sykes, her observations were presented to the jury. Thus, there is no basis for concluding that defense counsel was ineffective

for not further questioning Farst about her observations, or that his failure to do so was prejudicial.

Likewise, defendant Copas has not established that defense counsel's questioning of Detective Amley denied him a substantial defense. Defendant Copas's suggestion that further questioning would have established that the bullets were fired at an upward trajectory and in a manner intended to miss people is not supported by the record. First, defendant Copas ignores that two individuals inside the trailer were shot and killed by bullets fired from the van, thereby establishing that the bullets traveled at a trajectory suitable to strike people inside the trailer. Second, at least 15 bullets were fired along the front of the trailer and were concentrated in the area of the bay window, which was the area of illumination. Third, two assault rifles were used during the episode. Furthermore, as plaintiff points out, although the ballistics report showed that numerous bullets traveled through the trailer in an upward trajectory, it also revealed that bullets traveled within normal height ranges to strike individuals. In light of this evidence, there is no reasonable probability that further questioning on this subject would have affected the jury's verdict.[2] *Frazier, supra* at 243.

3. Failure to Recall Clint Ousley

Ousley testified as a prosecution witness on the second day of trial. On the morning of the third day of trial, the prosecutor informed the trial court and the defense attorneys that, after testifying, Ousley was arrested and charged on an unrelated criminal sexual conduct warrant. Defendant Copas now argues that defense counsel should have recalled Ousley to determine if he knew of the charge before he testified and, if so, whether it provided a motive for him to change his testimony from the preliminary examination and provide more damaging testimony at trial, apparently in exchange for leniency in his pending criminal sexual conduct case.

Defendant Copas has not established any support for his claim that Ousley was aware of the unrelated warrant before he testified in this case, let alone that there was any arrangement whereby Ousley would receive leniency in that case in exchange for his testimony in this case. The mere fact that Ousley's preliminary examination may have differed in some respects from his trial testimony does not support such an inference. Rather, the inconsistencies presented defense counsel with an opportunity to impeach Ousley, which he did. Defendant has failed to show that defense counsel's performance with respect to Ousley fell below an objective standard of reasonableness.

In addition, the principal evidence implicating defendants Copas and Tackett at trial came from two eyewitnesses who were in the van with the defendants during the shooting. Because Ousley did not provide the critical evidence implicating defendant Copas, there is no reasonable probability that further impeachment of Ousley would have changed the jury's verdict.

[2] For this same reason, defendant was not prejudiced by defense counsel's failure to request an adjournment after Amley did not complete the ballistics report until three days before trial. *Frazier, supra* at 243; see also *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

4. Failure to Object to a Joint Trial with Dual Juries

As explained in § I(E), *infra*, the trial court did not abuse its discretion by ordering that defendant Copas and codefendant Tackett be tried jointly, before separate juries.

Defendant Copas further argues, however, that defense counsel was ineffective for failing to object to the trial court's comments during trial, which defendant argues destroyed any protection provided by a dual-jury procedure. We disagree.

During preliminary instructions on the first day of trial, the trial court informed the two juries:

> You - - all of you will be here most of the time. There will be times when there's some evidence that's only relevant to one case or the other and then we'll have one jury hear that and the other not, but you will all be in the courthouse at the same time. You may not be in the courtroom at the same time.

On the second day of trial, the court explained:

> Ladies and Gentlemen, I indicated to you that there were times during this trial when you would hear separate testimony. We're going to do that. We're going to take our morning break a little early and then we'll bring you back one at a time to hear separate testimony. After the break we'll begin with the Tackett jury and then when - - after you're done, we'll switch and bring the Copas jury in. So a long break for the Copas jury now, a shorter break followed by a later break for the Tackett jury.

We find no merit to defendant Copas's argument that the trial court's comments allowed his jury to speculate that codefendant Tackett had "accused [him] of committing the crime." The trial court merely explained why some occasional absences from the courtroom might be necessary and then explained the anticipated schedule for the second day of trial. The court's remarks did not provide any basis for inferring what evidence or testimony might be presented in the codefendant's case during the period the jury was excluded from the courtroom. Therefore, defense counsel was not ineffective for failing to object to the remarks. Further, the trial court instructed the jurors concerning reasonable doubt and the determination of guilt or innocence, and cautioned the jury that each case had to be considered and decided on the evidence. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, there is no reasonable probability that defendant Copas was prejudiced by defense counsel's failure to object.

B. *Brady* Violation

Defendant Copas also argues that he was denied his right to due process because the prosecutor failed to timely provide discovery, contrary to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). We disagree. Because defendant Copas failed to raise this claim in the trial court, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A criminal defendant has a due process right of access to certain information possessed by the prosecution if that evidence might lead a jury to entertain a reasonable doubt about a defendant's guilt. *People v Lester*, 232 Mich App 262, 280; 591 NW2d 267 (1998), citing *Brady, supra*. Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence 'may make the difference between conviction and acquittal."' *Lester, supra* at 281 (citation omitted). In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Id.* at 281-282.

1. CSC Charge Against Ousley

There is no support for defendant Copas's claim that the prosecution suppressed favorable evidence. As previously indicated, Ousley testified on the second day of trial. On the morning of the third day of trial, the prosecutor informed the trial court and the defense attorneys that, after testifying, Ousley was arrested and charged on an unrelated criminal sexual conduct warrant. Contrary to defendant Copas's argument, the prosecution does not have a duty to disclose that a witness is under investigation in an unrelated matter. See *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999). Furthermore, given the substance of Ousley's testimony, the testimony of the two eyewitnesses who saw defendant Copas shoot an assault rifle, and defendant Copas's own statement placing himself at the scene, it is not probable that evidence of Ousley's CSC charge would have made "the difference between conviction and acquittal." *Lester, supra* at 281 (citation omitted). Consequently, defendant Copas has failed to establish a *Brady* violation.

2. Ballistics Report

Defendant Copas also has not established a *Brady* violation with regard to the late production of the ballistics report. There is no evidence that the prosecution suppressed the report. On the contrary, the record indicates that the report was completed on January 19, 2007, and provided to defense counsel that same day.

Furthermore, defendant Copas has not demonstrated that the ballistics report was favorable to the defense. The report showed that multiple bullets were fired through the front of Ousley's trailer and provided the trajectories for some of the bullets. As previously indicated in § I(A)(2), evidence that the bullets traveled in an upward trajectory was not favorable to the defense. Moreover, although defendant Copas speculates that earlier receipt of the report may have affected the outcome of his case, he makes no specific claims regarding the *actual* effect. In sum, defendant Copas has failed to show a plain error affecting his substantial rights. *Carines, supra*.

C. Photographic Evidence

Defendant Copas argues that the trial court abused its discretion in admitting autopsy photographs of the victims. We disagree. The decision to admit photographic evidence is within the sole discretion of the trial court and will not be disturbed on appeal absent a clear abuse of

discretion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995); *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998).

Photographs that are calculated solely to arouse the sympathies and prejudices of the jury may not be admitted. *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997). The question is whether the photographs are relevant under MRE 401 and, if so, whether their probative value is substantially outweighed by the danger of unfair prejudice under MRE 403. *Mills*, *supra* at 67-68, 76. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401.

The photographs were admissible to corroborate the medical examiner's testimony. *Id.* at 76. The photographs were relevant to show that two people were murdered, as well as being instructive in depicting the location, nature, and extent of the victims' injuries. *People v Williams*, 422 Mich 381, 392; 373 NW2d 567 (1985); *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). Additionally, the medical examiner testified that the male victim was 68 inches in height and the female victim was 63 inches in height. The photographs depicting the site of the entry and exit wounds on the victims' bodies supported the prosecution's theory that the gunshots were fired through the bay window of the trailer at a height intended to strike a human target. Thus, the photographs were relevant to the disputed issue of defendant Copas's intent. Intent to kill is an essential element of first-degree premeditated murder. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). Contrary to defendant Copas's suggestion, the fact that he did not dispute that the victims were shot does not render the photographs inadmissible. See *Mills*, *supra* at 71.

Moreover, a relevant photograph is not inadmissible merely because of its gruesome or shocking nature. *Id.* at 76. Here, the photographs depict the deceased victims' bodies and the presence of gunshot wounds, but they depict little blood or other graphic detail and are not overtly gruesome. It is apparent from the record that the trial court weighed the probative value of the photographs against their potentially prejudicial nature. See *People v Herndon*, 246 Mich App 371, 413-414; 633 NW2d 376 (2001). We cannot conclude that the trial court abused its discretion in admitting the photographic evidence.

D. Sufficiency of the Evidence

Defendant Copas argues that the evidence was insufficient to support his convictions of first-degree murder because the evidence failed to show that he intended to kill Ousley or the victims, or that he acted with premeditation and deliberation. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

In order to convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the decedent and that the killing was premeditated and deliberate. *Abraham, supra* at 656. Premeditation and deliberation require "sufficient time to allow the defendant to take a second look." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "Because it is difficult to prove an actor's state of mind, only minimal circumstantial evidence is required." *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005). The following nonexclusive list of factors may be considered to establish premeditation and deliberation: (1) the previous relationship between the decedent and the defendant, (2) the defendant's actions before and after the crime, and (3) the circumstances surrounding the killing itself, including the weapon used and the location of the wounds inflicted. *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991).

At trial, the prosecutor advanced the theory that each defendant was guilty as a principal or an aider and abettor. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *People v Izarraras-Placante*, 246 Mich App 490, 496-497; 633 NW2d 18 (2001) (citation omitted).

"Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *Carines*, *supra* at 757; *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). An aider and abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, and the defendant's participation in the planning or execution of the crime. *Carines, supra* at 758.

The evidence indicated that defendant Copas was involved in a confrontation with Ousley on the morning of the shooting, during which defendant Copas gestured the movement of cocking a gun. When defendant Copas was later driving away in a van, Ousley threw a crowbar, shattering the van's back window. Later that evening, defendant Copas and codefendants Tackett and Tard left defendant Copas's house with two assault rifles. They drove from Ecorse to Ypsilanti. Witnesses testified that, at some point, defendant Copas pulled two "long guns" from under a mattress in the van. Once in the Ypsilanti area, codefendant Tard stopped at a gas station where he covered the van's license plate. While there, defendant Copas repositioned himself from a middle seat to the rear section of the van near the broken window, which provided a better location from which to fire a weapon. Codefendant Sykes drove to Ousley's trailer. A law enforcement patrol car was in the area, so the van pulled over and waited until the patrol car left. While waiting, codefendant Tard said, "let's shoot up the trailer," and defendant Copas "[went] along with him." Once the law enforcement officer was out of the area, codefendant Sykes drove to Ousley's trailer. Afterward, defendant Copas put on a hooded sweatshirt, placed an assault rifle on the bottom part of the broken window, and fired into Ousley's trailer. At least 15 bullets were fired into the trailer in the area of the bay window.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant Copas was guilty of first-degree murder. The evidence that defendant Copas armed himself with an assault rifle after being involved in a confrontation with Ousley earlier in the day, went back to Ousley's trailer, and fired the rifle through the bay window of the trailer at a height calculated to strike a human target, was sufficient to permit a rational trier of fact to reasonably infer that defendant Copas possessed an intent to kill. Additionally, the drive from Ecorse to Ypsilanti, and the delay at the trailer park while waiting for the law enforcement officer to leave the area, demonstrated that there was "sufficient time to . . . take a second look" and supported a finding of premeditation and deliberation. *Anderson*, *supra*. In sum, the evidence was sufficient to sustain defendant Copas's convictions of first-degree murder.

E. Joint Trial with Dual Juries

Defendant Copas argues that the trial court abused its discretion by trying him jointly with codefendant Tackett, before separate juries.

The decision to sever or join the trials of codefendants lies within the sound discretion of the trial court. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). In general, a defendant does not have a right to a separate trial. *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). Indeed, a strong policy favors joint trials in the interest of justice, judicial economy, and administration. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Severance is mandated under MCR 6.121(C) only when a defendant clearly and affirmatively demonstrates through an affidavit or offer of proof that his substantial rights will be prejudiced by a joint trial and that severance is the necessary means of rectifying the potential prejudice. *Hana*, *supra* at 345-346. "Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice." *Id.* at 349 (citation omitted). "The use of separate juries is a partial form of severance to be evaluated . . . and . . . scrutinized with the same concern in mind that tempers a severance motion, i.e., whether it has prejudiced the substantial rights of the defendant. The precise issue is whether there was prejudice to substantial rights after the dual-jury system was employed." *Id*. at 351-352.

The charges against defendant Copas and codefendant Tackett arose out of a single criminal episode that involved numerous witnesses and substantially identical evidence. To hold separate trials in these substantially identical cases would have been unnecessarily duplicative and excessive. The interests of justice, judicial economy, and orderly administration clearly called for a joint trial. Although each defendant made a statement to the police that attempted to exculpate himself to a certain degree and implicate the other defendant, the use of separate juries alleviated the concern that a single jury might be exposed to one defendant's exculpatory evidence that was inadmissible with respect to the other codefendant. See *id*. at 362. Defendant Copas has not demonstrated that his substantial rights were prejudiced and the record does not show any "significant indication" that the requisite prejudice in fact occurred at trial. *Id*. at 346-347.

Accordingly, the trial court did not abuse its discretion by ordering defendant Copas and codefendant Tackett to be tried jointly, before separate juries.

II. Docket No. 277549 (Defendant Tackett)

A. Sufficiency of the Evidence

Defendant Tackett argues that the evidence did not support his convictions of first-degree murder because there was insufficient evidence of premeditation and deliberation. We disagree.

Viewed in a light most favorable to the prosecution, a rational trier of fact could have concluded that defendant Tackett committed first-degree murder or assisted in the commission of the crime. The evidence showed that defendant Tackett joined codefendants Copas and Tard hours after the codefendants were involved in an altercation with Ousley. The group left the house with two assault rifles, picked up codefendant Sykes and others, and traveled from Ecorse to Ousley's trailer home in Ypsilanti. When they were near Ousley's trailer, codefendant Tard stopped at a gas station and covered the license plate, and defendant Tackett moved from the passenger seat to the rear of the van near the broken window. Defendant Tackett put on gloves and supplied gloves or socks for the others. Codefendant Sykes continued to the trailer park. The van pulled over and waited until a patrol car left the area. As they waited, codefendant Tard said, "let's shoot up the trailer," and defendant Tackett "[went] along with him." After the patrol car left the area, the van continued to Ousley's trailer and the three men put on hooded sweatshirts. There was evidence that defendant Tackett shot or attempted to shoot a handgun while his codefendants fired assault rifles into Ousley's trailer. After the shooting, the group drove back to Ecorse where defendant Tackett attempted to hide the assault rifles in his father's garage.

Defendant Tackett's conduct before, during, and after the incident was sufficient to enable the jury to find beyond a reasonable doubt that he was a willing participant in the commission of the crimes. Further, the use of assault rifles supported an inference that defendant Tackett possessed an intent to kill, and the drive from Ecorse to Ypsilanti, along with the delay while waiting for a patrol car to leave the area immediately before the shooting, permitted an inference that the shooting was deliberate and premeditated. Although defendant Tackett did not have a personal relationship with Ousley, he had a relationship with some of the other codefendants involved in the offense and the evidence supported an inference that he agreed to participate and to provide support for his friends who had been involved in a confrontation with Ousley earlier in the day. In any event, proof of motive is not essential to establish premeditation. *Abraham, supra* at 657. Additionally, defendant Tackett's exculpatory explanation for his contact with the codefendants on the evening of the incident did not preclude the jury from finding him guilty of first-degree murder. It was up to the jury to determine the weight of the evidence and the credibility of witnesses, and this Court will not interfere in that determination. *Wolfe, supra* at 514. In sum, the evidence was sufficient to support defendant Tackett's convictions of first-degree murder.

B. Special Unanimity Instruction

Defendant Tackett also argues that he was entitled to a special unanimity instruction because the prosecutor presented two alternate theories, i.e., that he was guilty as a principal or as an aider and abettor. However, defense counsel's affirmative approval of the trial court's jury instructions waived any claim of error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001).

C. Ineffective Assistance of Counsel

1. Failure to Elicit Evidence

Defendant Tackett argues that defense counsel was ineffective for failing to further question a sheriff's deputy and a ballistics expert to elicit additional support for the defense theory that the defendants only intended to cause property damage. Defendant Copas raised this same claim in his appeal. Our analysis of defendant Copas's claim in § I(A)(2), *supra*, is equally applicable here. For those same reasons, we conclude that defendant Tackett was likewise not denied the effective assistance of counsel.

2. Failure to Object to Propensity Evidence

Defendant Tackett argues that defense counsel was ineffective for failing to object to evidence that defendant Tackett had a prior outstanding warrant for an undisclosed offense. We disagree.

During the prosecutor's direct examination of a police officer, the following exchange occurred:

> *Q.* Okay. And what were the circumstances under which you made contact with Joshua Tackett?
>
> *A.* I had learned that . . . Joshua Tackett had turned himself in to police custody at the Ecorse Police Department.
>
> *Q.* Okay. And did you then go to [sic] Ecorse Police Department and make contact with Joshua Tackett?
>
> *A.* Yes, we did.
>
> * * *
>
> *Q.* Okay. And after you made contact with Mr. Tackett at the Ecorse Police Department, what happened next?
>
> *A.* He was taken into custody *because he had an outstanding warrant*, and also he was wanted for questioning regarding the shootings. We had taken him back to - - to the Washtenaw County Sheriff's Department. He was handcuffed, placed in the back of the unmarked police vehicle, and then I was the driver . . .
>
> *Q.* Did you take him back to the Washtenaw Country Sheriff's Department?
>
> *A.* Yes, we did. [Emphasis added.]

Defendant Tackett correctly notes that a prosecutor may not indiscriminately introduce prior bad acts of a defendant. See MRE 404(b)(1). Here, however, the objectionable response was part of an unsolicited answer to an open-ended question about what occurred next in the

investigation. The question was not patently designed to elicit the improper testimony. Although defense counsel did not object to the testimony, defendant Tackett has not overcome the presumption that defense counsel's failure to object was reasonable trial strategy. Defense counsel reasonably may have determined that the reference was not particularly prejudicial because it was brief, isolated, and did not reveal the nature of the outstanding warrant, and that an objection would only draw more attention to the testimony. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). As previously indicated, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Rockey, supra*; *Stewart (On Remand), supra*. Moreover, given the weight of the evidence presented at trial, no reasonable likelihood exists that the brief reference affected the outcome of the case. *Frazier, supra*.

3. Failure to Request a Special Unanimity Instruction

Defendant Tackett also argues that defense counsel was ineffective for failing to request a special unanimity instruction. "Criminal defendants are guaranteed a unanimous jury verdict under the state constitution." *People v Gadomski*, 232 Mich App 24, 30; 592 NW2d 75 (1998) (citation omitted). As such, trial courts are required to give instructions on the unanimity requirement. *Id.* However, "Michigan criminal juries are not required to unanimously agree upon every fact supporting a guilty verdict." *Id.* at 31. Where there is sufficient evidence to show that a defendant committed a crime as either a principal or an aider and abettor, a specific unanimity instruction requiring the jury to unanimously agree on either theory of guilt is not required. *People v Smielewski*, 235 Mich App 196, 209; 596 NW2d 636 (1999).

Here, the prosecutor presented sufficient evidence that defendant Tackett participated in the offense as either a principal or an aider and abettor. Accordingly, the general unanimity instruction was sufficient. Therefore, defense counsel was not ineffective for failing to request a specific unanimity instruction. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

D. Admission of Evidence

Defendant Tackett further argues that the trial court abused its discretion when it admitted the untimely ballistics report and allowed the ballistics expert to testify. We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

In deciding whether to admit late evidence, a court should balance the dual goals of discovery, which are to enhance the fairness of the adversary system and to ensure that judgments are based on a full presentation of the facts. *People v Burwick*, 450 Mich 281, 296-297; 537 NW2d 813 (1995). The preclusion of evidence is an extreme sanction reserved only for particularly egregious cases. *Id.* at 294; *People v Clark*, 164 Mich App 224, 229-230; 416 NW2d 390 (1987). A defendant must also show that he was prejudiced by the trial court's decision. See *Burwick, supra* at 295.

The trial court did not abuse its discretion. The court acknowledged that the ballistics report was tardy, but also recognized that the ballistics evidence was important to the jury's full understanding of the facts of the case. In addition, the report was not withheld by the prosecution in bad faith. Rather, the report was not completed until January 19, 2007, and it was provided to defense counsel that same day.

Defendant Tackett, who was allegedly armed with a handgun during the shooting, argues that the late receipt of the ballistics report prohibited him from fully countering Amley's testimony that a .25-caliber bullet recovered from inside a heater duct was fired from a different weapon than the other recovered bullets, possibly a handgun. However, defendant Tackett had the opportunity to secure a rebuttal expert who had specific knowledge of aging bullets. The defense expert testified that he was able to ascertain from examining the .25-caliber bullet that it was fired "[m]onths and months, if not years," before it was collected as evidence. He had no hesitation about the bullet's age and explained that the difference between the recovered bullet and a recently fired bulled was like "the difference between day and night." He also opined that a .25-caliber bullet did not have the velocity to enter the heater duct if shot from outside the trailer. Through this testimony, defendant Tackett plainly was able to present his defense that the .25-caliber bullet derived from a prior incident.

Under the circumstances, the trial court did not abuse its discretion in admitting the ballistics report and allowing the ballistics expert to testify.

E. Photographic Evidence

Defendant Tackett lastly argues that the trial court abused its discretion by admitting the autopsy photographs of the victims. Our analysis of this issue in § I(C) of this opinion applies equally here. As explained previously, the trial court did not abuse its discretion in admitting the photographic evidence.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald